UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SALLY MORIN,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 98-415-P-C***
	)	
KENNETH S. APFEL,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") case returns to the court following a remand in 1997 on the basis that substantial evidence did not support the commissioner's determination that the plaintiff was not disabled at the time her insured status expired on December 31, 1992. The commissioner upon readjudication reached the same conclusion, which the plaintiff again assails as unsupported by substantial evidence. I recommend that the decision of the commissioner be affirmed.

Following remand in 1997, a supplemental hearing was held at which the plaintiff, the plaintiff's sister-in-law Nancy Morin, the plaintiff's treating physician Leonard C. Kaminow, M.D.,

[1] This action is properly brought under 42 U.S.C. § 405(g). The commissioner had admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the Commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on May 7, 1999 pursuant to Local Rule 16.3(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

and two independent medical experts, John A. Boothby, M.D., a neurologist, and Carlyle B. Voss, M.D., a psychiatrist, testified. Record pp. 214, 582, 584-85.[2] In accordance with the commissioner's sequential evaluation process, 20 C.F.R. § 404.1520; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found that the plaintiff met the disability insured status requirements of the Social Security Act on October 23, 1992, the date she stated that she became unable to work, and continued to meet them through December 31, 1992, Finding 1, Record p. 147; that she had not engaged in substantial gainful activity since October 23, 1992; Finding 2, Record p. 147; that the plaintiff had the following medically determinable impairment prior to the expiration of her insured status: status post cervical disc surgery, Finding 3, Record p. 148; that the plaintiff's subjective complaints were not entirely credible with respect to the onset and alleged severity of her impairments, Finding 4, Record p. 148; that the plaintiff did not have any impairments that significantly limited her ability to perform basic work-related activities prior to the expiration of her insured status on December 31, 1992 and therefore did not have a severe impairment prior to that time, Finding 5, Record p. 148; and that the plaintiff was not disabled at any time prior to December 31, 1992, Findings 6; Record p. 148. The Appeals Council declined to review the decision, Record pp. 7-8, making it the final determination of the commissioner, 20 C.F.R. § 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made

[2]At my request, the commissioner prepared a consolidated 614-page transcript in this case, certified on April 29, 1999, from which all references to the Record in this decision are drawn. The plaintiff's counsel at oral argument pointed out a discrepancy not only in the page-numbering sequence but also in the size of the consolidated transcript as compared with two prior separate transcripts. However, the plaintiff's counsel confirmed following oral argument that the records relevant to the plaintiff's claim appeared to be contained in the consolidated transcript.

is supported by substantial evidence. 42 U.S.C. § 405(g); *Manso-Pizarro v. Secretary of Health & Human Servs*., 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The commissioner in this case reached Step 2 of the sequential evaluation process, at which stage the claimant bears the burden of demonstrating that she has a severe impairment or combination of impairments that significantly limit her ability to do basic work activities. 20 C.F.R. § 404.1520(c); *Bowen v. Yuckert,* 482 U.S. 137, 146 n.5 (1987). The burden at Step 2 is *de minimis,* "designed to do no more than screen out groundless claims." *McDonald v. Secretary of Health & Human Servs*., 795 F.2d 1118, 1124 (1st Cir. 1986). Therefore, when a claimant produces evidence of an impairment or combination of impairments, the commissioner may make a determination of non-disability at Step 2 only when the medical evidence "establishes only a slight abnormality or combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered." *Id*. (quoting Social Security Ruling 85-28).

In her original appeal, the plaintiff contended among other things that the administrative law judge had not adequately considered her contention that her depression reached disabling severity prior to the expiration of her insured status. *See, e.g.*, Record p. 564. In a Report and Recommended Decision dated November 17, 1997 ("Recommended Decision") I concluded that, while the record as it existed at the time of the administrative law judge's decision supported the finding that the plaintiff's depression did not originate until 1993, new evidence submitted to the Appeals Council

cast that finding in doubt.[3] *Id*. at 565-66.

The record at the time of the original administrative law judge decision included a determination by Dr. Kaminow dated June 15, 1993 that the plaintiff probably was suffering from a depressed mental state, *id*. at 382, and a report by psychiatrist Israel Zeltzerman, M.D., following a consultative examination on June 16, 1995, that the plaintiff suffered from a "Major Depressive Disorder — Single Episode." *Id*. at 430-33. According to Dr. Zeltzerman's report,

> [t]here was available a considerable amount of information with regard to a surgical procedure involving dissection of the vertebral artery and this followed at least four strokes. This apparently all occurred in 1993.
>
> [The plaintiff] states that until she had her first stroke she was always a calm, cool and collected person and since that time she feels her personality has changed entirely. . . .
>
> Since 1993 she describes herself as feeling lousy, tired and confused.

Id. at 430; *see also id.* at 434 (noting 1993 surgery and "since then change in personality").

The record before the Appeals Council, however, included the report of psychiatrist John L. Newcomb, M.D., who examined the plaintiff on August 6, 1996. *Id.* at 524-26. Dr. Newcomb unambiguously opined that the plaintiff suffered from depression of disabling severity before the end of 1992. *Id.* at 525. He further concluded that Dr. Zeltzerman's report contained an "obvious error" relating to the plaintiff's contentions about when she became depressed; according to Dr. Newcomb, the plaintiff

> has maintained all along that, in her mind, the first stroke was in 1991 and that is the stroke she uses to date the onset of her depression. It is likely that [the plaintiff] was not clear as to her meaning when she indicated that the depression followed her stroke and that Dr. Zelterman [sic] reasonably, but mistakenly, inferred the 1993 date.

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[3]The Recommended Decision was affirmed by this court on December 16, 1997. Record p. 556-57.

Id. at 526.

Following remand, the plaintiff moved that the administrative law judge subpoena Dr. Zeltzerman for the purpose of clarifying inconsistencies in the Zeltzerman report regarding date of onset. *Id*. at 140. The administrative law judge denied the motion on the ground that no useful purpose would be served. *Id*. He reasoned that because Dr. Zeltzerman's sole examination of the plaintiff had occurred almost three years before the supplemental hearing, his written report would provide a more reliable representation of his findings than would his delayed recall at the hearing. *Id*. In any event, the administrative law judge stated, the purpose of medical expertise was better served by the presence of the two independent medical experts. *Id*. Finally, any insufficiency caused by Dr. Zeltzerman's absence was more than adequately remedied by the presence of Dr. Kaminow, the plaintiff's treating physician, "whose testimony would have carried more weight than that of Dr. Zeltzerman." *Id*. at 140-41.

The administrative law judge acknowledged that, in a case such as this in which there is no contemporaneous medical evidence of the onset of disability, "[i]n some cases, it may be possible, based on the medical evidence to reasonably infer that the onset of a disabling impairment(s) occurred some time prior to the date of the first recorded medical examination, e.g., the date the claimant stopped working." *Id.* at 142 (quoting Social Security Ruling 83-20). SSR 83-20 instructs that

> [i]n disabilities of nontraumatic origin, the determination of onset involves consideration of the applicant's allegations, work history, if any, and the medical and other evidence concerning impairment severity. The weight to be given any of the relevant evidence depends on the individual case.

Social Security Ruling 83-20, reprinted in *West's Social Security Reporting Service* Rulings 1983-

1991, at 50. The claimant's allegations as to onset date are the "starting point" of the inquiry, the date the claimant stopped working is "frequently of great significance," and medical reports are "basic to the determination," serving as "the primary element in the onset determination." *Id.* "[T]he [onset] date alleged by the individual should be used if it is consistent with all the evidence available." *Id*. at 51. SSR 83-20 advises adjudicators to seek the assistance of a medical advisor at hearing to help infer the onset of disability; in addition, lay evidence from family members, friends and others describing the claimant's condition at the claimed date of onset should in some cases be sought. *Id*.

The plaintiff contends that, although the administrative law judge as of the time of the second adjudication had all of these types of evidence available, including the services of two medical advisors at the supplemental hearing, he still misapplied SSR 83-20 and reached the wrong conclusions. *See, e.g.*, Plaintiff's Itemized Statement of Errors Pursuant to Local Rule 16.3(2)(A) ("Statement of Errors") (Docket No. 3) at 2. Specifically, the plaintiff complains, the administrative law judge (i) misapplied SSR 83-20, (ii) improperly assessed the medical evidence, (iii) improperly determined that the plaintiff did not suffer a severe impairment and therefore prematurely halted his analysis, (iv) improperly rejected the plaintiff's subjective symptom testimony, (v) improperly rejected lay testimony, (vi) improperly refused to issue a subpoena while relying upon the report authored by the subject of the subpoena, (vii) arrived at findings that are not supported by substantial evidence, and (viii) failed to assess the combined effects of the symptoms alleged by the plaintiff. *Id*. at 2-25. I disagree.

1. Statement of Error (i): Misapplication of Ruling 83-20

The plaintiff first alleges that the administrative law judge misapplied SSR 83-20 in denying

her claim based on lack of contemporaneous medical evidence. *Id.* at 4-5. A denial on this basis would indeed constitute legal error. *See, e.g., Lichter v. Bowen*, 814 F.2d 430, 435 (7th Cir. 1987); *Basinger v. Heckler*, 725 F.2d 1166, 1170 (8th Cir. 1984). However, the administrative law judge in this case denied the claim because he found the lay evidence, particularly that of the plaintiff, inconsistent with the credible medical evidence of record. *See, e.g.*, Record p. 147. Such a determination conforms with, rather than misapplies, the dictates of SSR 83-20. *See* SSR 83-20 at 52 ("The impact of lay evidence on the decision of onset will be limited to the degree it is not contrary to the medical evidence of record."). The administrative law judge, moreover, highlighted the plaintiff's failure to seek contemporaneous medical evidence as a basis upon which to question her credibility, not as a reason sufficient in itself for dismissal of her claim. *See, e.g.*, Record pp. 146-47. This was not improper. *See, e.g.*, *Basinger*, 725 F.2d at 1170 ("The failure to seek medical attention may, however, be considered by the administrative law judge in determining the claimant's credibility.").

2. Statements of Error (ii) to (v) and (vii): Improper Assessment of Evidence

A separate question remains, however, that is at the root of the majority of the remaining statements of error: whether the record substantially supports the administrative law judge's assessment of the evidence. The administrative law judge confronted a thorny chicken-and-egg type of problem. The opinion of Dr. Newcomb, which had led this court to remand for further proceedings, relied heavily on lay testimony regarding the plaintiff's condition in 1992. Yet, per SSR 83-20, lay descriptions are entitled to weight only to the extent not contrary to the medical evidence of record. SSR 83-20 at 52. A new opinion by the plaintiff's treating neurologist (Dr. Kaminow) that her depression apparently had originated prior to December 31, 1992 itself relied on

Dr. Newcomb's report and the lay evidence, as did the testimony of Dr. Boothby (an independent medical examiner) that the plaintiff had a significant depression in the summer and fall of 1992. *See, e.g.*, Record pp. 249-50, 585.

I conclude that, while the administrative law judge took some detours in parsing through the evidence, he ultimately reached an acceptable destination. The administrative law judge tethered his decision to the testimony of Dr. Kaminow without acknowledging that he was, in effect, discrediting the new Kaminow opinion that the plaintiff's depression commenced prior to 1993. *See id.* at 143-44. A treating physician's opinion on the "nature and severity" of a claimant's impairments must be accorded controlling weight to the extent it is determined to be "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] case record." 20 C.F.R. § 404.1527(d)(2).

The administrative law judge implicitly and supportably found the new Kaminow opinion inconsistent with other substantial evidence of record, including:

1. The plaintiff's own testimony that she stopped work in October 1992 because she was a fill-in for a permanent employee who had returned, and that she would have pushed herself to continue working until her January 1993 strokes (despite feeling ill) had she had the opportunity to do so. Record p. 258.

2. Medical records from the plaintiff's hospitalization in January 1993 that omit any mention of a history of feeling tired or depressed. *See, e.g., id.* at 342.

3. Dr. Kaminow's own progress notes and testimony at the supplemental hearing, which tellingly demonstrated that he noted a marked worsening in the plaintiff's mental condition between April and June 1993, leading him as of June 1993 to consider a diagnosis of depression. *See, e.g.,*

id. at 224-25 (testimony), 382, 391 (progress notes). As the administrative law judge observed, "[m]ental status is within the purview of [Dr. Kaminow's] medical specialty, and it is not likely that he overlooked significant signs of mental illness for months." *Id.* at 144.[4]

In addition, and although not mentioned by the administrative law judge, the record contains handwritten reports by the plaintiff in which she clearly dated the onset of a change in personality from January 1993. *See, e.g., id.* at 293 ("I'm just not the same person anymore. I trip a lot, over nothing, I have a very hard time concentrating - I'm very nervous, I forget all the time. At times I feel like I get lost. I'm very fatigue [sic] all the time. It's like I went in the hospital on Jan. 27 & came out a total different woman"), 401 (noting, in response to question whether there had been change in behavior, "I was a very active person & very calm person before this. That is probably why it was very hard for me to become like this," and that she had noticed this change "[f]rom the time I came out of the coma - I knew inside that I wasn't myself.").

Although the administrative law judge downplayed the Zeltzerman report, *id.* at 143, the above evidence is consistent with Dr. Zeltzerman's observation that "[s]ince 1993 she describes herself as feeling lousy, tired and confused." *Id.* at 430. Thus, while Dr. Newcomb provided a plausible theory as to how Dr. Zeltzerman could have mistakenly dated the onset of depression from 1993, *id.* at 526, there was substantial evidence from which this conflict could have been resolved in favor of the original Zeltzerman findings. *See, e.g., Rodriguez*, 647 F.2d at 222 ("The Secretary may (and, under his regulations, must) take medical evidence. But the resolution of conflicts in the

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[4]Dr. Kaminow's new opinion was, moreover, expressed in somewhat guarded terms. *See* Record p. 585 ("Judging from Dr. Newcomb's note from 10/10/96 and affidavits from her friends, it certainly appears that the patient's depressive condition occurred prior to 12/31/92. The medical record does not exclude the possibility that this depression occurred at that time or prior.").

evidence and the determination of the ultimate question of disability is for him, not for the doctors or for the courts.") (citations omitted).

In view of the foregoing, the administrative law judge was justified in brushing aside lay testimony dating the onset of depression from 1992, although not for the reason given (that the testimony was "less than disinterested"), Record p. 144, but rather because, per SSR 83-20, such testimony may be considered only to the extent not contrary to the medical evidence of record.[5] Medical opinions relying on those findings (those of Drs. Newcomb and Boothby, as well as the new Kaminow opinion) could in turn properly be given little weight.

3. Statement of Error (vi): Failure to Issue Subpoena

The plaintiff next complains that the administrative law judge erred in failing to honor her request to subpoena Dr. Zeltzerman. Statement of Errors at 20-21. In accordance with 20 C.F.R. § 404.950(d)(1), a subpoena may issue when it is reasonably necessary for the full presentation of a case. The plaintiff points out that Dr. Voss, whose testimony figured prominently in the administrative law judge's decision, relied upon the Zeltzerman report. Statement of Errors at 20. Thus, the Zeltzerman report "obviously impacted the Claimant's case dramatically," such that "fairness and due process demand that she get to [sic] the opportunity to examine him personally." *Id.*

[5]The administrative law judge undertook an extensive discussion — more extensive than necessary under the circumstances — of his reasons for finding the plaintiff's testimony that she was disabled by depression as of October 1992 less than credible. *See* Record pp. 146-47. The plaintiff responded in her Statement of Errors with a point-by-point rebuttal. Statement of Errors at 17-18, 22-24. Although not all of the administrative law judge's particularized credibility findings survive close scrutiny, the record substantially supports a finding that the testimony concerning the onset of depression in October 1992 was less than credible, particularly given the conflicting evidence elsewhere provided by the plaintiff herself.

The administrative law judge gave adequate reasons why the Zeltzerman subpoena was not necessary to a full presentation of the plaintiff's case. Most importantly, the progress notes of the plaintiff's own treating physician, Dr. Kaminow, as well as her own testimony, figured much more prominently in the assessment of her case than did the report of Dr. Zeltzerman, which the administrative law judge downplayed, or the derivative testimony of Dr. Voss. Secondarily, the administrative law judge rationally concluded that Dr. Zeltzerman's written report would provide a more reliable representation of his findings than would his delayed recall three years after completing a one-time examination of the plaintiff.[6]

For these reasons, the administrative law judge did not err in denying the request for the subpoena.

4. Statement of Error (viii): Failure to Address Combined Effect of Symptoms

The plaintiff finally alleges that the administrative law judge completely disregarded any reference to the effect of pain caused by the plaintiff's preexisting cervical and arthritic condition in assessing the severity of her condition as of the relevant time. Statement of Errors at 24-25. The plaintiff complains that a "host of missing medical records from Dr. David Scaccia, among others,

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[6]The plaintiff cites *Lidy v. Sullivan*, 911 F.2d 1075 (5th Cir. 1990), in support of her argument that the administrative law judge committed error in failing to subpoena Dr. Zeltzerman. Statement of Errors at 13. To the extent that *Lidy* stands for the proposition that a claimant has an absolute right to subpoena a reporting physician, 911 F.2d at 1077, I am not persuaded that the First Circuit would espouse this view were the issue squarely presented. *Lidy* cites a First Circuit case, *Figueroa v. Secretary of Health, Educ. & Welfare*, 585 F.2d 551, 554 (1st Cir. 1978), in support of its holding. *Id*. However, the cited portion of *Figueroa* addressed a separate and narrower issue: the right of a claimant to cross-examine a vocational expert appearing at a hearing. 585 F.2d at 554. The better view is that thoughtfully articulated by the Second Circuit in *Yancey v. Apfel*, 145 F.3d 106, 111-13 (2d Cir. 1998) — that for both legal and practical reasons, the commissioner need only accede to a request to subpoena a reporting physician when reasonably necessary to the full development of evidence in the case.

document a chronic condition with definite physical limitations." *Id*. at 24. Certain of Dr. Scaccia's notes are present in the record. *See* Record pp. 96-97, 102-03, 108-11, 118, 122. The plaintiff does not explain how or why these records are missing or specifically protest their loss in her statement of errors. Nor is there any indication that the plaintiff elsewhere pressed the issue. To the extent the Scaccia records are not part of the certified record before the court, I cannot consider the impact of their presence or absence.[7]

In any event, the administrative law judge did in fact consider the plaintiff's cervical and arthritic condition in assessing her likely status as of 1992. He noted that the plaintiff received no treatment for her neck problems from 1987 to September 1994, when she was involved in an automobile accident. *Id*. at 145. Her treating physician at that time observed that she had done relatively well with some chronic neck pain until she was involved in the accident. *Id*. She was able to work in various capacities from 1988 through 1992 without medical treatment and apparently under no medical restrictions. *Id*. Dr. Kaminow deemed her physically (though not mentally) capable of returning to work by March 31, 1993. *Id*. A note to Dr. Scaccia dated November 21, 1986 indicated that the plaintiff had been non-compliant with physical therapy, had been feeling "pretty well" at her most recent therapy and hence was being discharged from physical therapy. *Id*. at 94. The administrative law judge thus supportably could have drawn the conclusion that the plaintiff's neck pain imposed no limitations that prevented her from engaging in basic work activities through December 31, 1992. *Id*. at 145; *see also* 20 C.F.R. § 404.1521(a) (impairment or

[7]The plaintiff also complains that the administrative law judge failed to take into consideration complaints of foot pain as documented by the records of podiatrist Harold Chamberlain, D.P.M. *See* Statement of Errors at 25. The Chamberlain records pertain to foot pain reportedly experienced in 1993-94, Record pp. 394-95, and the plaintiff does not point to any other evidence that she suffered from foot pain prior to December 31, 1992.

combination of impairments not severe "if it does not significantly limit your physical or mental ability to do basic work activities").

5. Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 17th day of May, 1999.

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David M. Cohen
United States Magistrate Judge